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AMER
RECORDS
AND
BRIEFS

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No.

IN THE

Supreme Court of the United States

WILLIAM H. KELLEY,

Petitioner,

v.

SECRETARY OF THE FLORIDA
DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Where a jury has convicted a defendant of murder and sentenced him to death, relying on the uncorroborated testimony of a key government witness, and where it is conceded that the government has withheld from defense counsel material bearing on the credibility of that witness's testimony, may a federal court of appeals find such withheld material to be by definition immaterial under *Brady* simply because the witness's credibility was already to some degree impeached at trial?[†]

2. May a court reject an ineffective assistance claim on the basis that trial counsel arguably made the best of the bad situation their own failure to investigate engendered?

[†] The First, Second, Fifth, and Seventh Circuits agree with the Eleventh in answering "yes." The D.C. Circuit and the Ninth Circuit both firmly say "no." The matter is thus the subject of a clear circuit split on a topic of recurring importance both to the prosecution and to the defense in the administration of criminal justice.

PARTIES TO THE PROCEEDING

Petitioner is William H. Kelley.

Respondent is the Secretary of the Florida Department of Corrections.

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The Florida Supreme Court denied petitioner's direct appeal from his state conviction on April 10, 1986. *Kelley* v. *State*, 486 So. 2d 578 (Fla. 1986) ("*Kelley Fla. I*"), reprinted in the Appendix ("Pet. App.") as Pet. App. I at 163a.

This Court's order denying petitioner's application for a writ of certiorari to review the decision of the Supreme Court of Florida was entered on October 6, 1986. *Kelley* v. *Florida*, 479 U.S. 871 (1986), reprinted as Pet. App. H at 161a.

The Florida Supreme Court upheld the trial court's denial of post-conviction relief on September 6, 1990. *Kelley* v. *State*, 569 So. 2d 754 (Fla. 1990) ("*Kelley Fla. II*"), reprinted as Pet. App. G at 145a. That court subsequently denied a direct application for habeas relief on March 12, 1992. *Kelley* v. *Dugger*, 597 So. 2d 262 (Fla. 1992) ("*Kelley Fla. III*"), reprinted here as Pet. App. F at 138a.

The United States District Court for the Southern District of Florida granted habeas relief on two separate grounds on September 19, 2002, *Kelley* v. *Singletary*, 222 F. Supp. 2d 1357 (S.D. Fla. 2002) ("*Kelley Dist. Ct. I*"), reprinted as Pet. App. E at 119a, and on December 30, 2002, *Kelley* v. *Singletary*, 238 F. Supp. 2d 1325 (S.D. Fla. 2002) ("*Kelley Dist. Ct. II*"), reprinted as Pet. App. D at 109a. That court denied petitioner's motion for clarification on January 8, 2003, printed here as Pet. App. C at 108a.

On March 26, 2003, the district court stayed its order to release pending appeal. *Kelley* v. *Singletary*, 265 F. Supp. 2d 1305 (S.D. Fla. 2003), reprinted as Pet. App. B at 101a.

The Eleventh Circuit reversed the grant of habeas relief on July 23, 2004, *Kelley* v. *Secretary for the Department of Corrections*, 377 F.3d 1317 (2004) ("*Kelley 11th Cir.*"), reprinted as Pet. App. A at 1a, and denied petitioner's petition for rehearing and rehearing *en banc* on October 6, 2004 in an opinion printed here as Pet. App. J at 179a.

On December 29, 2004, Justice Anthony M. Kennedy, Circuit Justice for the Eleventh Circuit, granted an extension

of time until March 4, 2005, for the filing of this petition. The clerk's letter is printed here as Pet. App. L at 207a.

JURISDICTION

The Eleventh Circuit's decision reversing the district court's issuance of a writ of *habeas corpus* was entered on July 23, 2004. On October 6, 2004, that court entered an order denying petitioner's petition for rehearing and rehearing *en banc*. On December 29, 2004, Justice Anthony M. Kennedy granted an extension of time until March 4, 2005, for the filing of this petition. The instant petition is being filed within that time. This Court has jurisdiction under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o State shall * * * deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

The federal district court that granted petitioner William Kelley's petition for habeas relief and ordered his immediate discharge from prison after nearly twenty years on death row sought to convey the exceptional nature of this case by noting that "[t]he undersigned judge is not a foe of capital punishment and has granted only three § 2254's in thirty-plus years on the District Court bench." *Kelley Dist. Ct. I*, Pet. App. 137a n.7. The court of appeals reinstated the state conviction and sentence of death despite substantial evidence that the convicted defendant was entirely the wrong man, Joint Pretrial Stipulation of Facts in the Federal District Court

("Joint Stip."), Pet. App. 198a-99a, and in the process broke ranks with courts in other federal circuits that have developed appropriate standards for holding prosecutors to the requirements of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny.

(i) First, the court below, taking an approach followed by several of its sister circuits, rejected the method that a number of other circuits have rightly understood *Brady* and its progeny to require for evaluating the materiality of information potentially helpful to the defense but withheld by the prosecution. In a series of cases over the past thirty years, this Court has admonished that a prosecutor has a duty to disclose to a criminal defendant information that might be helpful to the defense. *See Banks* v. *Dretke*, 540 U.S. 668 (2004); *Strickler* v. *Greene*, 527 U.S. 263 (1999); *Kyles* v. *Whitley*, 514 U.S. 419 (1995); *United States* v. *Bagley*, 473 U.S. 667 (1985); *Giglio* v. *United States*, 405 U.S. 150 (1971). The Court has made clear that the measure of the prosecutor's compliance with this rule is whether a verdict resulting from a trial tainted by failure to give the defense material it needs but cannot otherwise obtain is "worthy of confidence." *Kyles*, 514 U.S. at 434. If confidence is at its highest when the state has presented a compelling case and the defense is weak or nonexistent, it must be at a low ebb—and the tide closest to turning—when the whole of the state's case rests on one key witness whose credibility was already cast into doubt even before the withheld evidence is taken into account.

What *Brady* and its progeny demand in these latter circumstances is the subject of disagreement among the circuits. Surprisingly many circuits[1] have developed the mechanical response that, once the defense has some way to

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[1] As to the First, Second, Fifth, and Seventh Circuits, *see, e.g.*, *Moreno-Morales* v. *United States*, 334 F.3d 140, 147-48 (CA1 2003); *United States* v. *Rodriguez*, 162 F.3d 135, 146-47 (CA1 1998); *United States* v. *Amiel*, 95 F.3d 135, 145 (CA2 1996); *Felder* v. *Johnson*, 180 F.3d 206 (CA5 1999); *Braun* v. *Powell*, 227 F.3d 908, 920-21 (CA7 2000).

impeach a witness, even a key witness, the prosecutor's withholding of evidence undercutting the witness's credibility in some other way does not taint the trial. This position—that a sullied witness is a sullied witness—has been roundly rejected by the Ninth Circuit[2] and was once adopted but has now been thoroughly repudiated by the District of Columbia Circuit.[3] It disregards the teaching of *Giglio* that when "the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [*Brady*]," 405 U.S. at 154 (quoting *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959)), and flips the full line of precedent stemming from *Brady* on its head. The Eleventh Circuit would find fatal a prosecutor's failure to disclose material impeaching a witness whom a jury otherwise had no reason to disbelieve, a result that *Brady*, at a minimum, certainly requires. But rather than applying with greater and greater force to weaker and weaker cases, the Eleventh Circuit rule holds that where a key witness was already just barely believable, and further impeachment thus would have been most likely to change the outcome, nondisclosure is fine and *Brady* material suddenly becomes *Brady*-immaterial.

When a prosecutor has built a shaky case around the testimony of a single witness of dubious credibility, the approach the Eleventh Circuit takes creates an incentive at odds with the objectives of a fair system of criminal adjudication. In this common situation, even "prosecutor[s] anxious about tacking too close to the wind," *Kyles*, 514 U.S. at 439, faced with a choice between disclosing or withholding information damaging to their case, can take comfort in this permissive court of appeals ruling. Knowing that the defense can already stir doubt in the minds of jurors about the credibility of the witness's testimony and indeed might

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[2] *See, e.g.*, *Benn* v. *Lambert*, 283 F.3d 1040, 1056 (CA9 2002); *Singh* v. *Prunty*, 142 F.3d 1157, 1163 (CA9 1998).

[3] *See, e.g.*, *United States* v. *Cuffie*, 80 F.3d 514, 518 (CADC 1996); *United States* v. *Smith*, 77 F.3d 511, 515 (CADC 1996).

already have done so, a prosecutor under the Eleventh Circuit rule can safely avoid giving the defense any further ammunition.

(ii) Second, the decision of the court of appeals completely obscures the fundamental duty to criminal defendants that the "assistance of counsel" entails—a duty that embraces more than simply showing up and putting on a "generally creditable" "performance at trial," given the evidentiary hand the defense has been dealt, *Kimmelman* v. *Morrison*, 477 U.S. 365, 386 (1986)—by simply ignoring the question of *why* that hand contains so few good cards. Counsel's responsibilities include an obligation to search for and interview witnesses absent a good reason not to do so, to assemble relevant documents, and to make an objectively reasonable effort to *prepare* at least a minimally adequate defense to present to the jury.

This case illustrates the prejudice both to the accused and to the system of justice that occurs when trial counsel utterly abdicate those responsibilities, satisfying themselves with "face time" in front of judge and jury. For in this case witnesses were readily available who would have testified that an underworld associate of the prosecution witness, an associate who had from the outset been a primary suspect in the case, *had already admitted committing the murder of which petitioner stood accused*. *See* Joint Stip., Pet. App. 198a-99a. Unfortunately for petitioner, however, defense counsel did no investigation but instead farmed out, to an incompetent, disbarred, and thoroughly disgraced attorney, the task of seeking and assembling a roster of defense witnesses. Defense counsel completely failed to supervise the investigator, who undertook no pertinent investigation and indeed absconded the day before the trial began, having turned up no useful witnesses but leaving behind a phony witness list, complete with fabricated addresses. Counsels' own failure to undertake any investigation, coupled with their wholly irresponsible abdication to their surrogate, "so undermined the proper functioning of the adversarial process

that the trial cannot be relied on as having produced a just result." *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984).

This Court has wisely eschewed "intrusive post-trial inquiry into attorney performance." *Strickland*, 466 U.S. at 690. But when it is as plain as it is here that trial counsel were content to maintain, and the state courts and federal circuit court content to countenance, the cosmetic *appearance* of legal representation as a substitute for any *real* representation, the time has come for a forcible reminder to bar and bench that the guarantee of counsel's assistance in criminal cases remains both meaningful and judicially enforceable to prevent "a breakdown in the adversarial process." *Id.* at 696.

It is worth noting that the two Questions Presented address problems on both sides of the adversarial equation. It is no coincidence that the cases laying out the standards on both sides find their common root in *Strickland*'s inquiry into the reasonable prospect that, but for the breach of duty, the trial's outcome may well have been different. *See Strickler*, 527 U.S. at 299-300 (Souter, J., concurring). But the fact that one will rarely find so stark a *Brady* violation joined in the same case with so utterly absent a trial defense and, in the end, with a habeas court's reluctant conclusion that it had no confidence in the jury's verdict, *see Kelley Dist. Ct. I*, Pet. App. 128a, 131a, 136a, unfortunately does not mean that either the Eleventh Circuit's insubordinate handling of the *Brady* issue, or its perfunctory approach to the assistance of counsel question, is rare or unpredictable. Unless this Court intervenes to make clear that its pronouncements about these two fundamental matters will be enforced, lower courts (and, *a fortiori*, prosecutors) will have little incentive to take them seriously.

1. Background

On October 3, 1966, Charles Von Maxcy, a wealthy citrus farmer, was murdered in his home in Sebring, Florida. After several months of investigation, Maxcy's wife, Irene,

informed authorities that she and her paramour, John Sweet, had hired assassins to commit the murder. Sweet, a real estate speculator with "shadowy ties to Boston's criminal underworld," *Kelley 11th Cir.*, Pet. App. 4a, was tried twice for the murder, but his only conviction was reversed on appeal; by 1971, he was a free man.

A decade later, after "the State had given up on the [Maxcy] case" and had "allowed the destruction of" "most of the physical evidence," Sweet, concerned that Massachusetts law enforcement authorities were going to bring charges against him—for "prostitution, narcotics distribution, arson, bribery, counterfeiting, loan sharking and highjacking, among other things"—went to the Massachusetts police to negotiate an immunity agreement. *Id.* at 8a. A Regional Organized Crime Intelligence Center based in Tennessee helped the Massachusetts police contact Florida authorities with the information that Sweet was in custody and was seeking immunity in exchange for information about the Maxcy murder. *Id.* at 73a. With the two hitmen Sweet had named in his trial long since deceased, and with those the State of Florida had named in that trial likewise dead, Sweet offered the Massachusetts and Florida authorities the name of the man he *then* claimed to have *really* hired to commit the murder fifteen years earlier. The name was William Kelley's.

According to a statement Sweet made to Massachusetts and Florida law enforcement officials at a meeting on March 12, 1981, he and the victim's wife had planned the murder so they could live together on Irene Maxcy's inheritance. To that end, Sweet contacted a man named Walter Bennett in Massachusetts to make the necessary arrangements. A price was set, and in early October 1966, two hitmen carried out the murder. *Id.* at 5a.

It is undisputed that "the state had insufficient evidence to proceed against [Kelley] until Sweet offered his testimony in 1981." *Kelley Fla. I*, Pet. App. 169a. The day after Sweet made his offer, the Massachusetts immunity he sought was

granted, and in December 1981 Kelley was indicted for first-degree murder in Florida.

Apart from Sweet's testimony that Kelley was the murderer, the only arguably significant evidence of Kelley's involvement was a scrap of paper indicating that a "Mr. and Mrs. William Kelley" had registered at a motel in Daytona Beach at the time of the Maxcy homicide, and the testimony of the motel clerk, Kaye Carter, confirming that *someone* identifying himself as a "William Kelley" was registered there at the time.

At Kelley's first trial in January 1984, counsel put on no defense case and did not seek to introduce any evidence, relying solely on cross-examination to support the theory that whoever registered at the Daytona Inn Motel using Kelley's name was not the *petitioner* William Kelley. This first trial resulted in a hung jury and mistrial.

At Kelley's retrial in March 1984, his trial counsel again presented no evidence to support the argument that Kelley had no involvement in the Maxcy murder but had been framed by Sweet and by whoever had registered under the name "William Kelley" at the Florida motel. Joint Stip., Pet. App. 197a. Prosecutor Hardy Pickard, aware that Sweet's credibility was the lynchpin of the State's case, pointedly argued in closing—seemingly crushing defense counsel's mere assertion to the contrary in *his* closing—that Sweet's Massachusetts immunity arrangement *could not have been* an inducement for his cooperation and testimony in Florida. As Pickard put it: "John Sweet got immunity from *Massachusetts* on a long list of things. It has nothing to do with the Maxcy case or giving them Kelley on the Florida cases. He *already had* his immunity from *Massachusetts* on loan sharking, whatever that long list of things were [*sic*]. He didn't have to give them Kelley to get immunity." *Kelley 11th Cir.*, Pet. App. 70a n.37 (emphasis added).

Charged to reach a verdict, the jury returned with a specific question: "we would like to know if John J. Sweet received immunity in Florida for first degree murder and

perjury *before* he gave information on the Maxcy trial, *and if he had anything to gain by his testimony*." *Kelley Dist. Ct. I*, Pet. App. 130a-31a (emphasis added). The prosecution persuaded the court not to read back Sweet's testimony. *Id.* at 131a. Again the jury retired. This time, it returned with a guilty verdict, and soon voted for death. The Florida Supreme Court affirmed. *Kelley Fla. I*, Pet. App. 163a. This Court denied certiorari. *Kelley* v. *Florida*, Pet. App. 161a.

2. State Post-Conviction Proceedings

Kelley filed a state post-conviction motion in November 1987 pursuant to Rule 3.850, Fla. R. Crim. Proc. His motion asserted: (i) a *Brady* claim alleging that the trial prosecutor had withheld material exculpatory evidence; and (ii) a claim of ineffective assistance of counsel alleging that counsel "failed to develop facts and interview witnesses."

In support of his *Brady* allegations, Kelley introduced previously withheld documents that detailed meetings between Sweet and Massachusetts and Florida authorities, showing that Sweet had been granted immunity in Massachusetts only immediately *after* agreeing to testify against Kelley in the Florida trial. *See* Joint Stip., Pet. App. 182a. Kelley argued that the withheld report and other documents describing the timing of the specific negotiations for Sweet's grants of immunity would have materially helped him impeach Sweet's testimony at trial by showing a powerful motive for Sweet falsely to accuse Kelley.

Kelley also introduced a number of other items of *Brady* material, including portions of the transcript from Sweet's first trial in 1967. There, Sweet had recounted a conversation with his lover and co-conspirator Irene Maxcy in which, believing he was talking for her ears only, he had admitted knowing Walter Bennett, his contact for the murder, but denied ever knowing a "William Kelley." *Id.* at 186a-87a.

Kelley's ineffective assistance claim "asserted that 'defense [counsel] failed to develop facts and interview witnesses to support'" its defense theory. *See Kelley 11th*

Cir., Pet. App. 51a. The basis of the theory was that the "William Kelley" who registered at the Daytona Inn Motel on the weekend of the murder was described by motel clerk Kaye Carter as about *forty* years old, *6'* tall, of *medium build*, with *dark curly hair* and a husky voice, while petitioner Kelley on October 3, 1966 was a young-looking *twenty-three-year-old*, at least *6'5"* inches tall, *conspicuously lanky*, with *straight blond hair*. *Kelley Dist. Ct. I*, Pet. App. 135a; Joint Stip., Pet. App. 189a-90a.

3. The State Court Decisions

The 3.850 court found no *Brady* violation as to the withheld information about Sweet's immunity deal or as to the 1967 trial transcript because it thought the information already known to the defense was roughly equivalent. It also found that "the actions and conduct of both defense attorneys in the course of the two trials" suggested acceptable assistance of counsel. *Kelley Fla. II*, Pet. App. 157a. The Florida Supreme Court perfunctorily upheld the trial court's order. *Id.* at 148a-58a.

4. Federal Habeas Proceedings

Kelley filed this, his first and only federal habeas corpus petition, on October 9, 1992.[4] For nearly eight years, through no fault of Kelley's, his petition remained in limbo. After extended briefing and argument, the court held an evidentiary hearing to consider the facts alleged with respect to some of the claims.

With respect to the *Brady* claim, the district court heard from Steve Rusconi, a former prosecutor who had worked for the law firm representing Sweet on his 1981 Massachusetts immunity petition, that Sweet would not have received immunity from Massachusetts "unless Mr. Sweet provided the information that the law enforcement officials from

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[4] This case is thus on its face pre-AEDPA. *See Lindh* v. *Murphy*, 521 U.S. 320, 336-37 (1997).

Massachusetts and Florida were looking for." Rusconi Test., Dkt #119, Dist. Ct. Hearing, at 29. Rusconi accordingly testified that the closing argument made at Kelley's second trial by prosecutor Hardy Pickard was "not accurate at all." *Id.* at 23. He also testified that any prosecutor attending Sweet's immunity negotiation meetings, as Pickard had, "should have known those statements were inaccurate." *Id.*

The district court also heard testimony on this issue from prosecutor Hardy Pickard himself. Contradicting his own untruthful closing argument against Kelley, Pickard testified that he was "sure" that Sweet *did* indeed "have something to gain *in Massachusetts*" by testifying against Kelley *in Florida*. Pickard Test., Dkt #99, Dist. Ct. Hearing, at 88-91 (emphasis added). He also conceded that "Massachusetts may have felt their immunity was conditioned on him testifying in Florida." *Id.* at 102.

With respect to Kelley's ineffectiveness claim, trial counsel Jack Edmund conceded at the hearing that "we didn't have any [witnesses] in the first place [by the end of Kelley's first trial] *because we really didn't look for them.*" Edmund Test., Dkt #99, Dist. Ct. Hearing, at 50 (emphasis added). Edmund deemed the defense team's "greatest error" its failure to seek out then available witnesses who would testify that Steve Busias had committed the murder with which Kelley was charged. *Id.* Busias—who stood to gain by deflecting the suspicion that would inevitably fall on him as a member of Sweet's circle of associates, and who knew and resented Kelley because of his own romantic interest in the woman who would eventually become *Mrs.* William Kelley—was known to defense counsel to have been a suspect in the murder. He was also known to match perfectly the description the hotel clerk recounted of the man who ostensibly called himself "William Kelley." As the State stipulated, however, the defense team simply failed to interview witnesses "*who w[ere] available to testify*" to highly incriminating facts implicating Busias. Joint Stip., Pet. App. 198a-99a.

The district court heard testimony from Charles Busias, who testified that his father used to do jobs for Walter Bennett, Sweet's contact for the murder, and that his father had gone to Florida in 1966, returning with cash to throw around. *Id.* at 199a. It also heard from Hobart Willis, who had been offered the contract to kill Von Maxcy and had declined. Willis told the court that Steve Busias had admitted to him that he, Busias, had committed the murder. *Id.*

5. The District Court's Decision

The district court first granted habeas relief on the *Brady* claim, finding that because "[t]he essence of the State's case was the testimony of Sweet," "[d]isclosure of [Sweet's] immunity and transcript from his first trial," which the prosecution had previously withheld, "would have resulted in * * * a markedly stronger [case] for the defense." Pet. App. 136a. The court also, in a later amended order, found for Kelley on his ineffective assistance claim because of defense counsel's "unreasonable failure to investigate and to present evidence." Pet. App. 112a. The state appealed.

6. The Court of Appeals' Decision

The court of appeals held that the district court should have rejected the *Brady* claims, holding that withholding of the evidence was not prejudicial to Kelley because all of the evidence withheld was "cumulative" of evidence already impeaching Sweet's credibility. Pet. App. 82a. In particular, as to the evidence of Sweet's immunity negotiations, the court held that the defense would have used the documents "to convince the jury that Sweet was a sullied witness"—but that petitioner could get no relief because "counsel succeeded" in that mission without them. *Id.*[5]

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[5] The court of appeals also downplayed the withholding of this evidence by simply denying the existence of a factual link between Sweet's Massachusetts immunity deal and his agreement to testify against Kelley in Florida, Pet. App. 77a. On the futility of that bold attempt, *see* Part I-D *infra*.

As for the transcript of Sweet's 1967 trial, the court acknowledged that Sweet's private denial that he knew a "William Kelley" "might seem critical in a vacuum," but reasoned that "the force of that denial is eroded almost entirely" by Sweet's admission at trial that he had denied "knowledge of or involvement with Kelley" in discussions with police and at his own trial. *Id.* at 85a. Sweet's phone conversations with Irene Maxcy were therefore "simply corroborat[ive]" of other impeachment evidence.[6] *Id.* at 87a.

The court of appeals also rejected Kelley's ineffective assistance of counsel claim, reasoning that it "was not merely a clarified rendition of an exhausted claim, but a new claim altogether," because the Rule 3.850 motion, while alleging a "failure to develop defense theories," had not *specifically* alleged that trial counsel were "constitutionally deficient * * * *because they relied on Harvey Brower*" to investigate, and so had not "fairly notified the State" as to the precise character of Kelley's claim. *Id.* at 55a-56a (emphasis added).

The court of appeals also surmised that counsel would anyway "likely have declined as a matter of trial strategy to give up the right to make the first and last closing arguments so that they could call some of the witnesses who testified at the federal evidentiary hearing," concluding that counsel's inadequate investigation thus could not be said to have prejudiced the inmate's defense. *Id.* at 66a.

On August 12, 2004, Kelley filed a petition for rehearing and a petition for rehearing en banc. Those petitions were denied on October 6, 2004. Pet. App. 179a.

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[6] The court also asserted that there was no indication that the State possessed the transcript at the time of Kelley's trials. Pet. App. 83a. In so doing, the court of appeals ignored the State's admission that the transcript had been in its files the whole time. Joint Stip., Pet. App. 186a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE ALARMING INVERSION OF THE *BRADY* LINE OF PRECEDENT BY SEVERAL CIRCUITS, INCLUDING THE ELEVENTH IN THE JUDGMENT BELOW, IN CONFLICT WITH OTHER CIRCUITS AND WITH THIS COURT'S DECISIONS IN *STRICKLER* AND IN *KYLES*

One would have thought this Court had made it clear that *Brady* and its progeny demand searching scrutiny for constitutional error when a criminal defendant from whom evidence was withheld has been convicted on the basis of a thin case. And a number of circuits do appear to have gotten the message.

Several others, however, have yet to absorb the teaching of this Court's precedents from *Brady* to *Strickland* and beyond that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support." *Strickland* v. *Washington*, 466 U.S. 668, 696 (1984). That notion explains why this Court, applying the general rule that "suppression of material evidence justifies a new trial," has held that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this rule." *Giglio* v. *United States*, 405 U.S. 150, 154 (1971) (quoting *Napue*, 360 U.S. at 269).

Giglio further announced the specific rule that, where the credibility of a government witness is "an important issue in the case, * * * evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." 405 U.S. at 154-55. Although this case involves withheld *Brady* material that would have helped the defense impeach the credibility of a key government witness, and in particular withheld "evidence of [an] understanding or agreement as to a future prosecution" of that witness, the court of appeals found that the jury was

not "entitled to know of it." Without even mentioning *Giglio*, the court disposed of the matter by reasoning that the evidence withheld would have been merely "cumulative" because defense counsel had successfully "convince[d] the jury that [the key witness] was a sullied witness." Pet. App. 82a.

In so doing, the court of appeals added its number to the roster of circuits applying an inverted analysis in the *Brady* context. That analysis has produced the rule that "[s]uppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *United States* v. *Amiel*, 95 F.3d 135, 145 (CA2 1996) (internal quotation omitted).

In *Kyles* v. *Whitley*, 514 U.S. 419 (1995), the notion of "cumulativity" betokened an analysis of whether a number of pieces of evidence, when placed in the context of the entire case, might in combination suggest a significant likelihood of an altered outcome—one that the evidentiary snippets viewed in isolation from one another, and from the rest of the case, might fail to suggest. *Id.* at 420. Perversely, the notion of cumulativity is invoked by these misguided circuits to *excuse* the prosecutorial withholding of material information. The net effect is that these courts have become desensitized to the way in which withholding even a single item of exonerating evidence might well tip the scales against the accused when the state is already only barely carrying its burden, a result *Kyles* certainly did not anticipate.[7]

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[7] Compounding its error, the Eleventh Circuit merely assessed the pieces of withheld evidence individually and uttered a generic incantation about their impact "whether the withheld items * * * are considered individually or collectively." Pet. App. 69a. By eschewing a genuine analysis of the overall effect the withheld evidence would have had, the Eleventh Circuit recapitulated exactly the error this Court corrected in *Kyles*, 514 U.S. at 440. On this basis alone it would be entirely appropriate to dispose of the decision below summarily. Given the extraordinary circumstances of this case, however, in which a quite plausibly innocent man who has languished on death row for twenty years brings his first habeas petition

A. Because Not All Circuits Apply *Brady* in the Inverted Manner of the Eleventh to Evidence That Impeaches a Key Witness, Criminal Defendants in Those That Do May Be Subjected to Verdicts Comparatively Unworthy of Confidence—a Condition This Court Should Intervene To Correct, Restoring Uniformity and Reasserting the Meaning of *Brady*

Had this case come up through the District of Columbia Circuit, the result would have been different, because that circuit has expressly repudiated its old rule that "an incremental amount of impeachment evidence on an already compromised witness does not create a 'reasonable probability' that the balance would have swung in favor of" the defendant in the case. *United States* v. *Derr*, 990 F.2d 1330, 1336 (1993). In explicitly rejecting *Derr*, the D.C. Circuit stated: "the fact that other impeachment evidence was available to defense counsel does not render additional impeachment evidence immaterial." *United States* v. *Smith*, 77 F.3d 511, 515 (1996). Under the new rule, a reviewing court "must look not to the ways defense counsel was able to impeach [a key witness], but to the ways in which the witness' testimony was allowed to stand unchallenged." *Id.* *See also United States* v. *Cuffie*, 80 F.3d 514, 518 (1996).

If the Eleventh Circuit had applied the D.C. Circuit rule, it would have considered whether any respect in which Sweet's credibility had been allowed to "stand unchallenged" might have been called into question by defense counsel, had they been armed with the undisclosed information. The evidence that Sweet had earlier told his lover that he did not know a "William Kelley" while at the same time admitting that he knew Walter Bennet, his accomplice, could well have

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before a federal court, merely vacating and remanding for yet further consideration would hardly seem an adequate remedy. Either summary reversal or a grant of certiorari for plenary consideration of the merits would seem far more appropriate.

affected the jury quite differently from the unsurprising evidence that Sweet had denied knowing Kelley when speaking to the police or testifying at his own trial. A reasonable juror, having inferred from the latter piece of information only that Sweet was *generally unreliable* simply because, although he might have known William Kelley, he was willing to lie to the police, might well have been convinced by the testimony about the conversation with Irene Maxcy that Sweet never knew Kelley at all and so *must be lying on the stand*. The latter inference is of course much more damaging to Sweet's testimony, and the D.C. Circuit's rule dictates that Kelley's opportunity to suggest it to the jury was impermissibly abridged when the prosecutor withheld the information.[8]

The Ninth Circuit has stated as well that where "the government's entire case rested on [one witness's] testimony," "[i]t makes little sense to argue that because [the defense] tried to impeach [the key witness] and failed, any further impeachment evidence would be useless." *United States* v. *Service Deli Inc.*, 151 F.3d 938, 944 (1998). The Ninth Circuit thus recognizes that *Brady* is at its most protective when a jury believes a key witness who has been so seriously impeached that it would take little added impeachment to shift the jury's assessment of that witness's testimony. That court has stated that the question is whether, "given disclosure of the evidence * * * one or more members of the jury would have viewed [the key witness'] testimony in a different light." *Singh* v. *Prunty*, 142 F.3d 1157, 1163 (1998).

Under this "one-juror/different-light" standard, the Ninth Circuit would have found *Brady* prejudice here. That

[8] The State recognized in an internal memorandum that the "#1 problem" it faced was that "[t]he testimony of John Sweet, on which its case against Kelley would pivot, would be in conflict with the testimony he provided in 1967 * * * which would automatically place his testimony in the impeachable category." Fla. Dep't of Law Enforcement Report, Feb. 21, 1981, at 3.

inference may be drawn at the very least from the fact that the convicting jury here came to an "impasse," Joint Stip., Pet. App. 184a, and asked for clarification on the question whether Sweet received immunity *before* or *after* promising to testify against Kelley. The prosecutor had assured the jury in closing argument that what "Mr. Kuntsler said * * * [was] not true" because Sweet's testimony against Kelley had "nothing to do with" his immunity deal with Massachusetts and that Sweet had offered his testimony only *after* that deal had already been struck. Having been so assured, jurors learning that, to the contrary, Sweet's offer to testify was made *just before* Sweet struck his immunity deal with Massachusetts may very well have concluded that Sweet's testimony against Kelley had *everything* to do with the immunity that followed his offer. That knowledge would have cast both Sweet's crucial testimony and the prosecutor's reliability in a very "different light" indeed—a light the jury itself had fruitlessly asked the state trial court to turn on. Under these circumstances, the Ninth Circuit would plainly have required the State to grant Kelley a new trial.

The Second Circuit, on the other hand, has long relied on the rule that "[s]uppressed evidence is not material when it 'merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.'" *United States* v. *Amiel*, 95 F.3d 135, 145 (1996) (quoting *United States* v. *Wong*, 78 F.3d 73, 79 (CA2 1996) (quoting *United States* v. *Payne*, 63 F.3d 1200, 1210 (CA2 1995))). The Fifth Circuit cites that rule approvingly as well, *Felder* v. *Johnson*, 180 F.3d 206, 213 (1999) (quoting *Amiel*, 95 F.3d at 145), and consistently acts in accordance with it. *See, e.g., Jackson* v. *Johnson*, 194 F.3d 641 (1999); *Edmond* v. *Collins*, 8 F.3d 290 (1993).

The First Circuit has likewise repeatedly held that additional impeachment evidence withheld by the prosecution *cannot* be material under *Brady* and its progeny where the witness has already been impeached. In *Moreno-Morales* v. *United States*, 334 F.3d 140 (2003), the court found that the

withholding of prior contrary testimony and polygraph results yielded no prejudice under *Brady*. Because "the defense had numerous other examples of contradictory statements," "[t]he evidence uncovered after the trial would have been merely cumulative." *Id.* at 148 (quoting *United States* v. *Sanchez*, 917 F.2d 607, 618 (CA1 1990)). *See also United States* v. *Rodriguez*, 162 F.3d 135, 146-47 (CA1 1998). The Seventh Circuit has just as consistently dismissed as merely "cumulative," and so by definition not material under *Brady*, evidence withheld by the prosecution that could have further undermined the credibility of an already impeached witness. *See, e.g., United States* v. *Maloney*, 71 F.3d 645, 653 (1995).

Holdings such as these from the First, Second, Fifth, Seventh, and Eleventh Circuits imply that, once a witness—even the key and indispensable government witness—has been impeached, prosecutors are effectively invited to withhold evidence of any deals struck with the witness in exchange for his testimony, on the innocent-sounding theory that evidence of such deals would be "merely cumulative" of the impeachment evidence that has already been presented.

Plainly, however, it is the impact of the withheld evidence on the likelihood that the jury will reject the prosecution's entire case that counts under this Court's precedents, from *Bagley* through *Banks*, at least as those precedents are consistently understood in the Ninth and District of Columbia Circuits.

B. The Issue over Which the Circuits Disagree Is of Vital Importance to Criminal Defendants Who, Although Innocent, May Be Convicted Because Denied a Fair Opportunity To Persuade Jurors That There Is at Least a Reasonable Doubt as to Their Guilt

The way the Eleventh Circuit has turned this Court's teachings upside-down risks negating *Brady* scrutiny in precisely those problematic cases in which a *Brady* violation is most likely to have delivered the coup de grace—i.e., those

in which the verdict turns entirely on the credibility of a key prosecution witness whose believability has already been eroded by impeachment in the course of cross-examination or through extrinsic evidence and might well have been reduced to zero by the final blow of the withheld *Brady* material.

By asking not whether the undisclosed evidence would have yielded a reasonable probability of a different result, but instead whether each undisclosed item is "merely cumulative" in the sense that its disclosure would "merely" have eroded the credibility of an already dubious witness, the Eleventh Circuit and those following the same path are not only asking the wrong question, but are asking a question most likely to be answered "yes" exactly when the prosecution's case is most vulnerable and when the withheld evidence (including withheld evidence useful to impeach prosecution witnesses) is most capable of shifting the outcome.

C. This Case Is a Fitting Vehicle Through Which To Address the Circuit Split

This petition presents the risks of prosecutorial misconduct and erroneous conviction in a particularly stark form, for the prosecution's entire case against Kelley depended on the concededly dubious testimony of the admitted mastermind of the murder; the undisclosed evidence bore on the one and only question the jury asked during its deliberations; the prosecution made statements in closing argument that were flatly incompatible with that undisclosed evidence, making the conviction suspect under *Brady* and doubly so under *Giglio*; and the jury indisputably had difficulty reaching a verdict.

In these circumstances, evidence of the link between Sweet's Massachusetts immunity deal and his cooperation in the Florida case can be called "cumulative" only in an utterly perverse and truly Pickwickian sense. The credibility of "[t]he State's key witness" was indeed already subject to attack and question, for he had conceived, arranged for, and even participated in this contract killing; he was no doubt "a

reprehensible villain who literally got away with murder" as well as with a long list of other crimes. *Kelley 11th Cir.*, Pet. App. 99a. But that just made it all the more troubling that *his incriminating testimony was, despite its weaknesses, evidently credited by the jury*: it *had* to have been in order for the jury to convict. Thus it became all the more important that information illuminating that key witness's possible motives for giving false testimony, about which the jury wondered aloud in its question to the court, not be withheld from the defense, and all the less plausible to classify evidence of that motive to lie as merely "cumulative."

It is therefore particularly unfortunate that the Eleventh Circuit adhered to the rule that the D.C. Circuit expressly rejected in *Smith*, 77 F.3d at 515. In its decision below, the court of appeals noted that "defense counsel's purpose for wanting to exploit Sweet's immunity arrangements was to convince the jury that Sweet was a sullied witness. There can be no doubt on this record that counsel succeeded without the Massachusetts immunity order and the [withheld] report. If introduced into evidence as part of Kelley's defense, these two exhibits would have constituted, at best, cumulative evidence." Pet. App. 82a. As the court of appeals added, "defense counsel effectively capitalized * * * on every potentially valuable argument the five items support." *Id.* at 99a.

Thus the Eleventh Circuit incorrectly held materiality to be a function solely of whether defense counsel was already able to raise certain arguments supported by the withheld evidence, rather than a function of whether the withheld material, in the context of the case as a whole, would have *strengthened* those arguments, or perhaps added others. It is precisely because doing either could make the ultimate difference in a close case that the rule of the Eleventh Circuit is untenable, and that that of the Ninth and District of Columbia Circuits is more faithful to the teaching of this Court's cases and to the underlying principles of due process.

D. The Attempt by the Court Below To Minimize the Importance of the Withheld Material Furnishes an Additional Reason To Set Its Judgment Aside

To put the capstone on the misshapen structure the Eleventh Circuit has built, the court below played a hybrid appellate factfinding role in making its own determination of just why Massachusetts gave Sweet the immunity he sought, and precisely what motivated Sweet to offer up Kelley so many years after he had personally evaded punishment for plotting (and perhaps even committing) the underlying murder—a factual determination that differed strikingly from the district court's finding in this habeas proceeding. Moreover, the court of appeals twisted its role without either a plausible argument that the district court had committed clear error on the basis of the evidentiary record before it or plausible record support for its own revisionist history.

In particular, the federal district court had found it "clear from the withheld report that Sweet was willing to testify [against Kelley] *if he could be granted immunity*" for his Massachusetts crimes. *Kelley Dist. Ct. I*, Pet. App. 130a (emphasis added). The court of appeals—brushing aside the district court's contrary finding as "preposterous," Pet. App. 78a, with the stunning remark that it was "obvious * * * that the district court was confusing" Florida with Massachusetts, *id.* at 77a—found that "the record at hand leads inexorably to the fact that [Prosecutor] Pickard told the truth" when he informed the jury that Sweet's immunity in Massachusetts was not predicated on his testifying against Kelley. *Id.*

The judgment embodying that finding is impossible to square with the place of an appellate court in the federal judicial hierarchy. What the court below did could hardly be in clearer defiance of *Amadeo* v. *Zant*, 486 U.S. 214 (1988). In *Amadeo*, this Court reversed the Eleventh Circuit for its similarly improper reversal of a district court grant of habeas; the *Amadeo* Court held that the court of appeals had wrongly engaged in de novo factfinding rather than deferring as it

should have to the district court's own findings of fact. The fate of the Eleventh Circuit's renewed excursion into de novo appellate review here should be a decision by this Court granting the petition and either summarily setting aside the judgment below or ordering plenary briefing and argument.[9]

II. THIS COURT SHOULD ALSO REVIEW THE CIRCUMVENTION OF *KIMMELMAN* AND *WIGGINS* BY DECISIONS THAT FOCUS SOLELY ON HOW EFFECTIVELY COUNSEL PRESENTED THEIR CASE AND PAY NO ATTENTION TO HOW (OR WHETHER) ANY MATERIALS FOR THAT CASE WERE ASSEMBLED

A. Petitioner's Claim Presents a Clear Case for Reversal Under *Kimmelman* and *Wiggins* Because Trial Counsel Failed To Undertake *Any* Investigation, a Failure That Was Prejudicial Because Strong Evidence of Petitioner's Innocence Would Have Been Turned Up by Any Investigation

When William Kunstler delegated the entire task of investigating Kelley's case to Harvey Brower, a disbarred attorney with a miserable reputation and a criminal record,[10] he all but sentenced Kelley to death. Kuntsler did not oversee Brower's work and so did not realize until the eve of trial that the list of witnesses Brower had given him was a list of fake names with fake addresses, by which point Brower had "absconded." Joint Stip., Pet. App. 193a.

Had Kunstler fulfilled his responsibility to investigate Kelley's case, he would have uncovered two witnesses who

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[9] *See supra* note 7.

[10] It is common ground here that Brower, to be charitable, was ill-suited to the task he agreed to undertake. Brower had been disbarred in Massachusetts less than five years earlier for defrauding a client, and convicted of a federal felony in a case affirmed on appeal by the Fifth Circuit. The district court was properly unforgiving in its assessment of his competence. *See generally Kelley Dist. Ct. II*, Pet. App. 114a.

were willing to testify that it was Steven Busias who had committed the crime of which Kelley had been accused. Originally one of the state's prime suspects in the case, Busias perfectly matched the description the hotel clerk gave of the man who called himself "William Kelley" when checking in the night before the murder. *Id.* at 198a-99a. Steve Busias's son Charles would have testified, he told the district court, that his father went down to Florida around the time of the murder and came back with money to burn. *Id.* at 199a. Even more damning, a Busias sidekick named Hobart Willis told the federal habeas court that he would have testified at Kelley's trial that Busias had told him that he, Busias, had committed the murder. *Id.*

Straightforwardly applying this Court's decision in *Kimmelman* v. *Morrison*, 477 U.S. 365 (1986), where trial counsel's failure to conduct any pretrial discovery reflected not a "strategy" but "[a] mistaken belief" that someone else could be counted on to bring to light all necessary evidence, *id.* at 385, the district court concluded that it made no difference whether that "someone else" was the State, which the defendant in *Kimmelman* mistakenly believed "was required to turn over all inculpatory evidence," *Kelley Dist. Ct. II*, Pet. App. 116a, or was instead an inept and corrupt investigator of trial counsel's own choosing, *id.* Accordingly, the district court properly found the assistance of counsel in this case to be at least as ineffective as that which *Kimmelman* deemed fatally so. *Id.* at 117a.

Nor could any other conclusion be reconciled with this Court's recent teaching in *Wiggins* v. *Smith*, 539 U.S. 510 (2003), which emphasized that the responsibility to provide effective assistance to the accused includes a duty meaningfully to investigate the relevant facts and to have good reasons for *not* investigating further. It would indeed be an absurd rule, one emphasizing theatrics over lawyering, that would excuse counsel's failure to find out anything about the facts bearing on the defense that counsel intended to present whenever counsel staged a performance at trial satisfactory

for one who had no facts with which to work. It is thus unsurprising that the Court in *Wiggins* said that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 521 (quoting *Strickland* v. *Washington*, 466 U.S. 668, 690-91 (1984)). *Wiggins* thus ratified the district court's holding in this case that Kelley's counsel failed to provide effective assistance.

It is hard to imagine a set of facts more strikingly illustrative of just how differently a trial would have gone if counsel had fulfilled their responsibilities. Where defense counsel had made out no case at all, instead they would have put on witnesses showing that a police suspect who had gone to Florida at the time of the murder had admitted committing it. Surely, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Seeking to overcome the otherwise unrebutted force of the claim of *no* competent pretrial investigation, the court of appeals suggested that petitioner's trial counsel had made "full use," in the two-month interim between Kelley's first and second trials, of the "additional opportunity to conduct the investigation Brower neglected." Pet. App. 66a. But that ignores the undisputed point that Kelley's counsel, for the duration of this interim period, *made no use whatever* of the opportunity to investigate their and their client's *sole defense theory that Kelley had nothing to do with the Maxcy murder,* opting instead to look *only* for more character evidence, the better to undermine Sweet's credibility and enhance Kelley's,[11] and resting their theory of Kelley's complete innocence on the fruits of Brower's earlier investigations—in other words, on *nothing*.

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[11] *See* Edmund Test., Dkt #99, Dist. Ct. Hearing, at 51 (describing investigation between Kelley's two trials as focused entirely on finding witnesses who would "say bad things about Sweet" and "say good things about Kelley").

All that remains as to the merits of petitioner's claim, then, is the question whether a sufficiently plausible performance *at trial* by counsel who have *no evidence supporting their sole theory—that their client did not commit the act charged*—can make up for the concededly insufficient assistance of counsel in investigating *pretrial* and thus *generating* no such evidence. Of course, when the habeas hearing has turned up so *much* evidence of actual innocence—which was available at the time of trial, had counsel bothered to look—the prejudicial effect of the constitutional default is unusually transparent.[12] So the question becomes: can a "strategic" choice at trial to put on no defense case, made in the face of a predicament entirely of counsel's own creation, somehow bootstrap defense counsel's prejudicially ineffectual pretrial performance above the line of minimal constitutional adequacy? The answer seems so obviously to be "no" that summary reversal under *Kimmelman* and *Wiggins* would be entirely appropriate. Failing that, plenary briefing and argument should be ordered on both Questions Presented.

B. Petitioner Consistently Raised His Ineffective Assistance of Counsel Claim in the State Courts and So Has Exhausted His State Remedies Without Defaulting on That Claim

The state's highest court, sitting to hear the appeal from the denial of petitioner's post-conviction claim for relief, heard and rejected petitioner's claim that his trial counsel had "failed to *investigate*, *develop*, or present readily available

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[12] The court of appeals tried to sidestep the obvious prejudicial effects of counsel's investigatory failings by speculating that counsel "would likely have declined" to call even powerfully exculpatory witnesses simply to reserve the first and last closing arguments, as Florida procedure allowed. Pet. App. 66a. This implausible supposition "resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations" prior to trial, not a permissible mode of inquiry for a reviewing court. *Wiggins*, 539 U.S. at 526-27.

evidence that would have supported their own defense theories." *Kelley 11th Cir.*, Pet. App. 55a (quoting from petitioner's brief appealing denial of post-conviction relief) (emphasis added). In a process the court of appeals described as "carefully distill[ing]" petitioner's state post-conviction allegation of inadequate investigation into "seven specific grievances," the Florida court's analysis left glaringly untouched Kelley's broad claim that petitioner's trial counsel conducted *no meaningful investigation at all.* The federal district court on habeas did not make that mistake.

That court, while properly imposing upon petitioner the burden to "demonstrate, by a preponderance of the evidence, ineffective assistance of counsel," *Kelley Dist. Ct. II*, Pet. App. 113a, and while recognizing that "failure to investigate" is not per se deficient performance under *Strickland*, nonetheless concluded that defense counsel here fell "outside the wide range of professionally competent assistance." *Id.* (quoting *Strickland*, 466 U.S. at 690). The basis for the court's conclusion was that counsel performed *no* investigation into the facts bearing on their sole defense theory, that of petitioner's complete innocence, having instead simply "delegated responsibility for *all* pretrial motions, investigations, and witness interviews to Harvey Brower," a disbarred attorney who actually conducted no investigation. *Id.* at 114a (emphasis added).[13]

The intervening decision in *Wiggins* notwithstanding, the court of appeals ultimately overturned the habeas relief that was granted here *for the same failing by counsel that marred that case*—to wit, for the "complete lack of [any] pretrial investigation strategy," *Id.* at 117a, that could have put evidentiary meat on the bones of the defense theories, resulting in "ineffective assistance of counsel" for Kelley. *Id.* The court did so on the basis that petitioner's presentation of

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[13] "Brower had disappeared" by the time the retrial began, *Kelley 11th Cir.*, Pet. App. 12a, had "failed to provide trial counsel with a pretrial investigation report," *Kelley Dist. Ct II.*, Pet. App. 114a, and had supplied "trial counsel with phony witness lists and non-existent addresses." *Id.*

that claim to the state courts somehow gave the State insufficient notice that petitioner "intended to challenge his conviction on the ground that his attorneys were constitutionally deficient in their duty to investigate or because they relied on Harvey Brower for this chore." *Kelley 11th Cir.*, Pet. App. 55a. Yet the court of appeals expressly recognized that Kelley's "claim assail[ing] [his] trial counsel for failing to develop * * * [their] core theories that Sweet performed the murder unassisted or that the petitioner was not the person who registered at the Daytona Inn Motel under Kelley's name" *had been "exhausted"* in the state courts. *Id.* (emphasis added). So the argument comes down to the proposition that the State was unprepared to meet the same claim once it had been more thoroughly elaborated and illustrated.

With respect, that argument should not be taken seriously. The court below, on the very next page, quoted petitioner's argument to the state court that "[w]ithout a reason," defense counsel "simply failed to investigate and thus failed to develop or use the tools that they had." *Id.* at 56a. The problem seems to be that, although Brower was the Hamlet around whom the Rule 3.850 play revolved and was the subject of voluminous testimony at the hearing that was the play's main act, the Prince's *name* "appears only twice" in the brief appealing the Rule 3.850 court's ruling, *id.* at 57a, and does so in a section of that brief dealing with the alleged ineffectiveness of only *one* of petitioner's two trial attorneys rather than in a section devoted to "a discussion of trial counsel's investigatory dereliction." *Id.* at 58a.

The State, unsurprisingly, did not protest—either in the state post-conviction proceedings or in defending the result of those proceedings on appeal, *see* Brief of Appellee at 35-51, *Kelley Fla. II*, 569 So. 2d 754 (responding to petitioner's ineffective assistance claim without protestation that any part of that claim was procedurally barred)—that it was unfairly surprised by the inclusion of evidence that trial counsel's dereliction of investigation took the form of delegating the

task to what amounted to a sinkhole. And the Eleventh Circuit's suggestion that the sudden "appearance" of supplementary and merely corroborative material at the federal district court hearing on an ultimately uncontested matter (namely, the sheer ineptitude and incapacity of the individual in whose hands trial counsel had chosen to place the life of their client) somehow signaled the intolerably novel recasting of petitioner's claim is little short of incomprehensible.

Incanting inapposite "concerns for comity, judicial efficiency, and fairness" to the State of Florida, Pet. App. 59a, the court of appeals derided petitioner's "theory of ineffective assistance" as presented to the state courts for including "a hodgepodge of grievances," *id.* at 49a, and otherwise castigated petitioner for having launched an ambush of the State. But the reference to Brower in the state supreme court brief was merely *illustrative* of the same basic point petitioner has been making *ever since his conviction*, and the fact that Brower figures more dramatically in the briefs filed in the federal habeas proceeding than he did in earlier writings hardly warrants downgrading his earlier appearance to that of a mere "'needle in the haystack of the state court record,'" *id.* at 59a (internal citation omitted), since in fact each grievance that made up the "hodgepodge" was of course traceable to Brower's failure. *See Vasquez* v. *Hillery*, 474 U.S. 254, 260 (1986) (claim exhausted since "the supplemental evidence presented by [the petitioner] did not fundamentally alter the legal claim already considered by the state courts").

Slapping down a district court judge whom it elsewhere derided as "hasty," *Kelley 11th Cir.*, Pet. App. 41a, and "confused," *id.* at 98a, the court of appeals had little to say in response to the point that this federal habeas proceeding is rather late in the day for the State suddenly to discover that it is "shocked, shocked" at the invocation of Brower to enliven the narrative, other than to suggest that being the State means

it's *never* too late to assert failure to exhaust.[14] But because petitioner all along asserted that he suffered from ineffective assistance of counsel by virtue of counsel's failure to investigate, and because the State long ago chose not to contest the viability of that claim, petitioner's claim should be considered on its merits.

CONCLUSION

This is a compelling case for .certiorari because it provides a straightforward opportunity for the Court to:

(i) resolve a split as to the rules governing prosecutorial conduct under *Brady* between the Eleventh, First, Second, Fifth, and Seventh Circuits, on the one hand, and the D.C. and Ninth Circuits, on the other; and to

(ii) make clear that, deferential as courts must be to the strategic decisions of trial counsel, this Court's patience has its limits, for the right to the effective assistance of counsel includes a right to at least *some* minimally adequate preparation for a meaningful defense if one is available.

One was available here, permitting the Court to correct a gross miscarriage of justice that began twenty years ago and will soon end in the execution of a probably innocent man if this Court does not act.

The petition for a writ of certiorari should be granted.

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[14] The court of appeals acknowledged that in pre-AEDPA cases such as this, the state "may waive exhaustion either expressly or impliedly," Pet. App. 61a. Nevertheless, the court of appeals cited statutory authority governing "[w]here AEDPA applies," *id.* at 61a n.33, to support the conclusion that, as long as the State pleads lack of exhaustion in federal court, non-exhaustion may be rendered "a viable issue." *Id.* at 61a. That argument is a frivolous application of AEDPA law to a pre-AEDPA case, and cannot stand.

Respectfully submitted,

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